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Supreme Court, U.S.
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No. 01-200

IN THE

Supreme Court of the United States

UNITED STATES HEALTHCARE SYSTEMS OF PENNSYLVANIA, INC.,

Petitioner,

v.

PENNSYLVANIA HOSPITAL INSURANCE COMPANY, and THE COMMONWEALTH OF PENNSYLVANIA MEDICAL PROFESSIONAL LIABILITY CATASTROPHE LOSS FUND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Introduction 1

I. Footnote 3 In The Government's *Rush Prudential* Brief Does Not Undermine The Government's Support For, Or The Correctness Of, The Decision Of The Pennsylvania Supreme Court In *Pappas II* 2

II. Disposition Of The Petition For Writ Of Certiorari 8

Conclusion 10

TABLE OF CITED AUTHORITIES

Page

Cases:

Dukes v. U.S. Healthcare, Inc., 57 F.3d 350 (3d Cir. 1995) 10

In re U.S. Healthcare, Inc., 193 F.3d 151 (3d Cir. 1999) 10

Lazorko v. Pennsylvania Hospital, 237 F.3d 242 (3d Cir. 2000) 10

Mackey v. Lanier Collections Agency and Service, 486 U.S. 825 (1988) 9

Mennan Co. v. Atlantic Mutual Ins. Co., 147 F.2d 287 (3d Cir. 1998) 10

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) 9

Pappas v. Asbel, 724 A.2d 889 (Pa. 1998) 2

Pappas v. Asbel, 768 A.2d 1069 (2001) ..... *passim*

Pegram v. Herdrich, 530 U.S. 211 (2000) ..... *passim*

Pfieffer v. School Bd., 897 F.2d 779 (3d Cir. 1990) .. 10

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) .. 2

Pryzbowski v. U.S. Healthcare, Inc., 245 F.3d 266 (3d Cir. 2001) 1, 8, 9, 10

Rush Prudential HMO, Inc. v. Moran, No. 00-1021 ..... *passim*

INTRODUCTION

Petitioner's supplemental brief of November 19, 2001 calls the Court's attention to a footnote in the Brief for the United States as Amicus Curiae in *Rush Prudential HMO, Inc. v. Moran*, No. 00-1021, a case which focuses on an HMO's challenge to a state independent review statute. Petitioner recognizes that *Rush Prudential* and this case involve "analytically different" questions (Supplemental Brief for Petitioner, p. 6). Nevertheless, petitioner asserts that footnote 3 of the government's amicus brief in *Rush Prudential* is "critical" to its pending petition for writ of certiorari (*Id.*, p. 3), because, in the petitioner's view, that footnote "disavows" the brief that the Secretary of Labor filed with the Pennsylvania Supreme Court in *Pappas v. Asbel*, 768 A.2d 1069 (2001) (*Pappas II*) (*Id.*, p. 1, 3, 4). Putting its own spin on that footnote and on this case, petitioner's supplemental brief argues that the Pennsylvania Supreme Court "got it wrong." (*Id.*, p. 1, 3, 4).

Next, surmising that "[t]he Court's inaction on this case following the October 26 Conference almost certainly indicates that the case is being held pending the disposition of *Rush Prudential*," (Supplemental Brief for Petitioner, p. 4), petitioner's supplemental brief "urges" the Court to relist this case "for either the November 30 Conference or a Conference in December, and to grant certiorari at that time so that the case may be briefed, argued, and decided this Term" (*Id.*, p. 1, 5). Petitioner reiterates its view that action by your Honorable Court is needed at least to resolve the conflict which the petitioner sees between *Pappas II* and *Pryzbowski v. U.S. Healthcare, Inc.*, 245 F.3d 266 (3d Cir. 2001), and to persuade the Pennsylvania Supreme Court to "see the error of its ways" and to "abandon its idiosyncratic ways." (*Id.*, p. 6).

I. FOOTNOTE 3 IN THE GOVERNMENT'S *RUSH PRUDENTIAL* BRIEF DOES NOT UNDERMINE THE GOVERNMENT'S SUPPORT FOR, OR THE CORRECTNESS OF, THE DECISION OF THE PENNSYLVANIA SUPREME COURT IN *PAPPAS II*

In their Brief in Opposition to petitioner's petition for writ of certiorari from the Pennsylvania Supreme Court's decision in *Pappas II*, respondents referred to and included as an appendix the amicus brief filed by the Secretary of Labor in *Pappas II*. Respondents did so to dispel the petition's misimpression that *Pappas II* merely rubber-stamped its decision in *Pappas v. Asbel*, 724 A.2d 889 (Pa. 1998) (*Pappas I*), inconsistently with your Honorable Court's decision in *Pegram v. Herdrich*, 530 U.S. 211 (2000), and with the government's views of *Pappas I*. Contrary to the petition's assertions, the government's amicus brief in *Pappas II* demonstrated that *Pegram* changed the government's view of this case and that *Pappas II* correctly considered and applied *Pegram* pursuant to your Court's remand directive.

Petitioner's reply brief acknowledged that the Secretary of Labor's amicus brief in *Pappas II* stated that "*Pegram* had changed the government's views" (Reply Brief for Petitioner, p. 5). However, petitioner's reply brief asserted that the change was only from seeing a conflict between the "blanket non-preemption rule" of *Pappas I*, and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), to seeing that the claim in this case may have been *preempted* in light of *Pegram*. (*Id.*, p. 5-6; emphasis added). Petitioner's reply brief also asserted that the government "jumped the gun" on its analysis and application of *Pegram* in the context of this case. (*Id.*, p. 6)

In contrast to the petitioner's mischaracterization, the position that the government took in *Pappas II* was that, following the principles crystallized by *Pegram*, "the Court should hold that USHC may have made a 'mixed' treatment and eligibility decision and, if it did, *ERISA does not preempt*

a state negligence action challenging the decision." (Br. in Opp. App. 12a; emphasis added). Furthermore, the government did not "jump the gun," because your Honorable Court expressly remanded the case to the Pennsylvania Supreme Court for reconsideration in light of *Pegram*.

Now, in its supplemental brief, petitioner asserts that the government has "disavowed" the amicus brief in *Pappas II*. Significantly, however, neither the Secretary of Labor nor the Solicitor General has filed or sought to file a brief or any other communication with your Honorable Court in this case to "disavow" the position that the government took in *Pappas II*. If, as the petitioner's supplemental brief asserts, the government no longer adheres to that position, one would have expected the government to express that allegedly new position to your Honorable Court and to the parties directly in this case, rather than through a footnote in a brief that was filed in an analytically different case. Moreover, a proper analysis of exactly what the government said in footnote 3 of its amicus brief in *Rush Prudential* undermines the petitioner's assertion that the government used that footnote to disavow what it argued in *Pappas II*, and by implication, to disavow the decision made by the Supreme Court of Pennsylvania in *Pappas II*.

Although petitioner's supplemental brief regards footnote 3 of the government's amicus brief in *Rush Prudential* as "critical" to its pending petition for writ of certiorari (Supplemental Brief for Petitioner, p. 3), that brief does not present the full text of that footnote. The footnote states (00-1021 U.S. Br. 8-9):

> The Secretary of Labor addressed the import of *Pegram*[*v. Herdrich*, 530 U.S. 211 (2000)] in an amicus brief filed with the Pennsylvania Supreme Court in *Pappas v. Asbel*, 768 A.2d 1069 (2001), petition for cert. pending, No. 01-200, on remand from this Court, see *United States Healthcare Sys. Of Pa., Inc. v. Pennsylvania Hosp.*

> *Ins. Co.*, 530 U.S. 1241 (2000). In *Pappas*, an HMO employee — who was not a treating physician — refused to authorize out-of-network treatment for an HMO subscriber. The Secretary contended that " the logic of *Pegram* applie[d]" to that case. Sec'y of Labor Br. at 11 n.6. However, the Secretary also noted that "[d]ifferent considerations may apply when an HMO * * * uses medical judgment in deciding whether a claim for treatment that has already been provided should be paid." *Id.* at 12 n. 7. In any event, for the reasons given in the text, regardless of whether the claim is made before or after treatment, the better view is that an HMO employee deciding a claim is an ERISA fiduciary.

Contrary to the dramatic assertions of the petitioner's supplemental brief, the plain text of that footnote hardly "disavows" the brief that the Secretary of Labor filed in *Pappas II*. To put it bluntly, but accurately, the footnote says no such thing. The plain text of footnote 3 only refers to two footnotes in the *Pappas II* brief. Reference is made first to footnote 6, in which the government stated,

> Because *Pegram*'s holding, that ERISA's fiduciary standards do not govern "mixed" treatment and eligibility decisions by HMO physicians, turns on the nature of the decision, and not on the structure of the HMO making the decision, the logic of *Pegram* applies to this case. See *id.* at 2155 ('Congress did not intend [the HMO in that case] *or any other HMO* to be treated as a fiduciary to the extent that it makes mixed eligibility decisions acting through its physicians') (emphasis added).

Br. in Opp. App. 11a-12a. Footnote 3 does not express any change in that view. Preceded by the signal word "However," footnote 3 then addresses footnote 7 of the *Pappas II* brief, in which the government stated,

> Different considerations may apply when an HMO, or other managed care entity, uses medical judgment in deciding whether a claim for treatment that has already been provided should be paid. Those are the sorts of decisions that insurance companies make in determining whether payment should be made under a fee-for-service ERISA plan.

Br. in Opp. App. 12a. Footnote 3 then adjusts that view on claims for payment for treatment by stating, "for the reasons given in the text, regardless of whether the claim is made before or after treatment, the better view is that an HMO employee deciding a claim is an ERISA fiduciary."

In addition to missing the point of clarification made in footnote 3, where the government changed only what it said about a claim for payment for treatment, not what it said about the tort claim for bodily injury or contribution damages involved in this case, the petitioner's supplemental brief misconstrues the context in which footnote 3 was written. That footnote was written for *Rush Prudential*, an "analytically different" case, because it deals with the statutorily imposed rules for binding independent review at the option of the claimant versus the sole discretion rules written by the HMO. *Rush Prudential* does not involve the type of tort claim involved in this case.

The government's amicus brief in *Rush Prudential* chose first to speak to whether or not the statute "relates to" ERISA. 00-1021 U.S. Br. 6-11. The "text" to which footnote 3 refers presents the government's explanation that *Pegram* does not alter the government's conclusion that the independent review statute "relates to" ERISA. *Id.*, p. 7-11. What the government appears to have perceived in its *Rush Prudential* brief is simply that *Pegram* should not be read to hold that pure benefit or eligibility determinations do not lose their ERISA fiduciary status every time they may be made by a doctor or may involve some medical consideration.

To that extent, the government's amicus brief in *Rush Prudential* is in harmony with what your Honorable Court's unanimous opinion stated in *Pegram*, that, in considering whether a case involves a claim that is subject to ERISA, the pertinent questions are the capacity in which the HMO employee acted and then the nature of the decision at issue. In particular, your Court first observed that "the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram*, *supra*, 530 U.S. at 226. Next, your Court directed,

> It will help to keep two sorts of arguably administrative acts in mind. Cf. *Dukes* v. *U.S. Healthcare, Inc.*, 57 F.3d 350, 361 (3d Cir. 1995) (discussing dual medical/administrative roles of HMOs). What we will call pure 'eligibility decisions' turn on the plan's coverage of a particular condition or medical procedure for its treatment. 'Treatment decisions,' by contrast, are choices about how to go about diagnosing and treating a patent's condition: given a patient's constellation of symptoms, what is the appropriate medical response?

Pegram, *supra*, 530 U.S. at 227-228.

Furthermore, as your Honorable Court pointed out, pure eligibility decisions include determinations such as "whether appendicitis is a covered condition (when there is no dispute that a patient has appendicitis), or whether acupuncture is a covered procedure for pain relief (when the claim of pain is unchallenged)," *Pegram*, *supra*, 530 U.S. at 228, or "such as whether a plan covers an undisputed case of appendicitis," and "rejecting a claim for no other reason than the HMO's financial condition." *Id.* at 229. Thus, if what the government means to say in its amicus brief in *Rush Prudential* is that such decisions remain pure eligibility decisions even though they are made by

an HMO-employed doctor or involve some medical consideration, the government's brief correctly applies *Pegram*.

The government's amicus brief in *Rush Prudential* is also consistent with your Honorable Court's unanimous pronouncements in *Pegram* to the extent that the brief recognizes that "treatment decisions" or "mixed eligibility and treatment decisions," as defined in *Pegram*, are not ERISA-protected fiduciary decisions when made by an HMO doctor even though that doctor has no traditional physician-patient relationship with the plan participant or beneficiary. Given the limited contour of the case in which the government filed that amicus brief, where the question deals with the procedures under which a payment dispute about an HMO's eligibility decisions can be resolved, the brief's emphasis on "treatment" leaves intact the government's position in *Pappas II*, because the issue is one that implicates a treatment decision made when no genuine question of coverage appears, and yet preserves the point that the government tries to make in *Rush Prudential*, that the statute "relates to" ERISA because it involves "fiduciary" decisions under *Pegram* or the statute at least involves regulation of "the claims resolution processes utilized by ERISA plans". 00-1021 U.S. Br. 10-11.

However, if what the government's amicus brief is meant to suggest is that *Pegram* should be read to restrict the non-fiduciary status of "medical necessity" determinations and similar decisions, such as, "physicians' conclusions about when to use diagnostic tests; about seeking consultations and making referrals to physicians and facilities other than [the HMO's]; about proper standards of care, the experimental character of a proposed course of treatment, the reasonableness of a certain treatment, and the emergency character of a medical condition," *Pegram*, *supra*, 530 U.S. at 229-230, to those made only by HMO physicians who have a traditional doctor-patient relationship with the claimant, the government's suggestion runs afoul of what your Court explicitly said in *Pegram*: those decisions are at least "mixed eligibility and treatment decisions,"

Id. "We think Congress did not intend Carle or any other HMO to be treated as a fiduciary to the extent that it makes mixed eligibility decisions acting through its physicians," *Id.* at 231, and "mixed eligibility decisions by HMO physicians are not fiduciary decisions under ERISA," *Id.* at 237. Moreover, your Honorable Court never expressed that limiting distinction in *Pegram*, but rather spoke in terms applicable to all HMOs and their employees. *See* 530 U.S. at 231-232.

What petitioner sees as "crucial" to its petition in footnote 3 of the government's amicus brief in *Rush Prudential* actually undermines petitioner's position. The government has not disavowed the central position which it took in light of *Pegram* in the brief that it filed with the Pennsylvania Supreme Court in *Pappas II*. That position, which views the claim made against the petitioner in this case as a mixed eligibility and treatment decision that is not preempted by ERISA, remains officially unchanged.

II. DISPOSITION OF THE PETITION FOR WRIT OF CERTIORARI

Respondents decline to join with petitioner in the speculation expressed in Part 2 of its supplemental brief as to why no order issued about this case following your Honorable Court's conference on October 26, 2001. Although respondents anticipate that your Court will dispose of the pending petition for writ of certiorari, respondents also decline to join with petitioner in dictating when your Court should make its decision.

Despite the petitioner's chastisement of the respondents' discussion of the merits of this case (Supplemental Brief for Petitioner, p. 1; Reply Brief for Petitioner, p. 2), petitioner's supplemental brief also discusses the merits of the case in urging your Honorable Court to promptly list the case, to grant certiorari to resolve the conflict which the petitioner sees between *Pappas II* and *Pryzbowski*, *supra*, and to persuade the Pennsylvania Supreme Court to "see the error of its ways" and to "abandon its idiosyncratic ways." (*Id.*, p. 6).

Consideration of the merits or circumstances of a case plays an undeniably important role in your Honorable Court's disposition of a petition for writ of certiorari. That is why petitioner's supplemental brief asserts that the Pennsylvania Supreme Court "got it wrong" in *Pappas II* and rendered a decision which draws a line of conflict between the state courts which are obliged to or choose to follow *Pappas II* and the federal courts which are obliged to or choose to follow *Corcoran* and *Pryzbowski*. One cannot make — or refute — such assertions and discuss the "certworthiness" of a case without considering the merits and the circumstances of the case.

Respondents' Brief in Opposition delineated the reasons why the Pennsylvania Supreme Court got it right in *Pappas II*, and there is no need to reiterate those reasons in this brief. Suffice it to say, that the petitioner's supplemental brief, like its petition for writ of certiorari and its reply brief, overlook or attempt to obscure the undeniable fact that this case involves at least a mixed decision or a pure treatment decision as defined in *Pegram*. This is so, because the petitioner was obliged to cover and clearly stated that it would cover emergency care "any time, anywhere," "anywhere in the world," "24 hours a day, 7 days a week," and that "[w]hen a delay would be detrimental to your health, seek the nearest medical attention". Respondents' Pennsylvania Supreme Court Reproduced Record, p. 156a, 157a, 158a. In short, this case does not involve a pure benefits determination that is shielded by ERISA. Rather, it involves a determination which *Pegram* clearly places beyond the ERISA preemption shield that the petitioner seeks to raise to prevent its being held accountable in the type of common place tort-based medical malpractice action which your Honorable Court has always regarded as not having been displaced by ERISA. *See Mackey v. Lanier Collections Agency and Service*, 486 U.S. 825, 833 (1988); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-655 (1995); *Pegram, supra*, 530 U.S. at 235.

In its reply brief, petitioner recognized that "[i]f, for example, the alleged basis for liability of the HMO is that its own personnel committed medical malpractice in the course of treating a subscriber, there is no reason why the malpractice claims need implicate plan administration and no reason why ERISA should preempt them." (Reply Brief for Petitioner, p. 3). Petitioner's belief that respondents in this case are "trying to hold an HMO liable because it will not *pay for* out-of-network services" (*Id.*, emphasis in original) notwithstanding, the claim in this case is that petitioner committed medical malpractice by directing and delaying appropriate treatment. Thus, as stated in their brief in opposition, respondents respectfully suggest that your Honorable Court deny the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons and those advanced in their brief in opposition, respondents respectfully ask that your Honorable Court deny the petition for writ of certiorari. Petitioner's insistence that *Pappas II* presents a conflict with *Pryzbowski* and that your Honorable Court should act swiftly rekindles the respondents' alternative suggestion that your Honorable Court grant the petition for writ of certiorari, summarily affirm *Pappas II* in light of *Pegram*, and note its disapproval of *Pryzbowski* and the other cases which petitioner asserts are in conflict with *Pappas II*.[1]

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1. Petitioner's assertion that *Pappas II* conflicts with *Pryzbowski* makes *Pryzbowski* difficult to reconcile with *Pegram* and with the prior decisions of the Third Circuit in *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350 (3d Cir. 1995), *In re U.S. Healthcare, Inc.*, 193 F.3d 151 (3d Cir. 1999), and *Lazorko v. Pennsylvania Hospital*, 237 F.3d 242 (3d Cir. 2000). Courts in that circuit could decline to follow *Pryzbowski* on the ground that *Pryzbowski* conflicts with *Pegram*, *Mennan Co. v. Atlantic Mutual Ins. Co.*, 147 F.2d 287, 294 (3d Cir. 1998), or is "without effect," because it is inconsistent with the earlier panel decisions, *Pfieffer v. School Bd.*, 897 F.2d 779, 781 (3d Cir. 1990). Disapproval of *Pryzbowski* by your Honorable Court would, of course, be more forceful.

Respectfully submitted,

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